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IN THE UNITED STATES BANKRUPTCY COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
RICHMOND DIVISION

- - - - - x  
In re: : Chapter 11  
:  
CIRCUIT CITY STORES, INC., : Case No. 08-35653 (KRH)  
et al., :  
:  
Debtors. : Jointly Administered  
- - - - - x

**DEBTORS' MOTION FOR ORDERS PURSUANT TO BANKRUPTCY CODE SEC-  
TIONS 105 AND 363 AND BANKRUPTCY RULE 6004 (I) APPROVING  
PROCEDURES IN CONNECTION WITH SALE OF EXCLUDED DEFECTIVE  
INVENTORY, (II) APPROVING SALE OF SUCH INVENTORY FREE AND  
CLEAR OF ALL INTERESTS AND (III) GRANTING RELATED RELIEF**

The debtors and debtors in possession in the  
above-captioned jointly administered cases (collectively,

the "Debtors")<sup>1</sup> hereby move (the "Motion"), pursuant to sections 105 and 363 of title 11 of the United States Code (the "Bankruptcy Code") and Rule 6004 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") for entry of an order (I) approving procedures for a sale (the "Sale") of the Debtors' Excluded Defective Inventory (as defined herein), (II) approving the Sale of such inventory free and clear of all interests, and (III) granting related relief. In support of the Motion, the Debtors respectfully represent as follows:

#### **JURISDICTION AND VENUE**

1. This Court has jurisdiction to consider this Motion under 28 U.S.C. §§ 157 and 1334. This is a core proceeding under 28 U.S.C. § 157(b). Venue of

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<sup>1</sup> The Debtors and the last four digits of their respective taxpayer identification numbers are as follows: Circuit City Stores, Inc. (3875), Circuit City Stores West Coast, Inc. (0785), InterTAN, Inc. (0875), Ventoux International, Inc. (1838), Circuit City Purchasing Company, LLC (5170), CC Aviation, LLC (0841), CC Distribution Company of Virginia, Inc. (2821), Circuit City Properties, LLC (3353), Kinzer Technology, LLC (2157), Abbott Advertising Agency, Inc. (4659), Patapsco Designs, Inc. (6796), Sky Venture Corp. (0311), PRAHS, INC. (n/a), XSStuff, LLC (9263), Mayland MN, LLC (6116), Courchevel, LLC (n/a), Orbyx Electronics, LLC (3360), and Circuit City Stores PR, LLC (5512). The address for Circuit City Stores West Coast, Inc. is 9250 Sheridan Boulevard, Westminster, Colorado 80031. For all other Debtors, the address is 9950 Mayland Drive, Richmond, Virginia 23233.

these cases and this Motion in this District is proper under 28 U.S.C. §§ 1408 and 1409.

2. The statutory predicates for the relief requested herein are Bankruptcy Code sections 105 and 363 and Bankruptcy Rule 6004.

#### **BACKGROUND**

3. On November 10, 2008 (the "Petition Date"), the Debtors filed voluntary petitions in this Court for relief under chapter 11 of the Bankruptcy Code.

4. The Debtors continue to manage and operate their businesses as debtors in possession pursuant to Bankruptcy Code sections 1107 and 1108.

5. On November 12, 2008, the Office of the United States Trustee for the Eastern District of Virginia appointed a statutory committee of unsecured creditors (the "Creditors' Committee"). To date, no trustee or examiner has been appointed in these chapter 11 cases.

6. On January 16, 2009, the Court authorized the Debtors, among other things, to conduct going-out-of-business sales at the Debtors' remaining 567 stores pursuant to an agency agreement (the "Agency

Agreement") between the Debtors and a joint venture, as agent (the "Agent"). On January 17, 2009, the Agent commenced going out of business sales pursuant to the Agency Agreement at the Debtors remaining stores.

7. Pursuant to the Agency Agreement, the Agent will liquidate the vast majority of the Debtors' inventory through the going-out-of-business sales. However, the Agency Agreement specifically excludes from the going-out-of-business sales inventory that is damaged, defective, incomplete, out of box, refurbished, repaired or otherwise not reasonably suitable for its intended purpose (the "Excluded Defective Inventory"). Agency Agreement at § 5.1(b). Thus, the Agent is not responsible for selling such inventory.

#### **RELIEF REQUESTED**

8. By this Motion, the Debtors seek entry of an order, substantially in the form attached hereto (the "Order") (I) approving the Sale Process (as defined herein) for the sale of the Excluded Defective Inventory, (II) approving the Sale of such inventory free and clear of all interests upon filing the Sale Notice (as defined

herein) by the Debtors and (III) granting related relief.<sup>2</sup>

#### **BASIS FOR RELIEF**

9. As discussed above, in light of the Debtors' decision to liquidate the vast majority of their inventory through going-out-of-business sales, the Debtors have been left with various assets -- including the Excluded Defective Inventory -- for which they have no remaining use. In contrast, the sale of such assets, including the Sale of the Excluded Defective Inventory, could yield significant proceeds for the benefit of the Debtors' estates and creditors.

##### **A. The Sale Process.**

10. Prior to the Petition Date, in the ordinary course of business, the Debtors have sold damaged, defective and incomplete inventory, similar to the Excluded Defective Inventory. Specifically, the Debtors have sold new, defective, obsolete or otherwise unsold inventory via a company-operated website, [bulkauc-](#)

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<sup>2</sup> The Debtors are also soliciting bids from liquidators to sell all or portions of the Excluded Defective Inventory, which the Debtors will seek separate approval for if they determine that such a transaction is in the best interests of their estates and creditors.

[tutions.tradingcircuit.com](http://tutions.tradingcircuit.com), (the "Website") since 2004.

Prior to 2004, the Debtors' sold such inventory by means of a similar non-automated process. The process by which the Debtors' sell such inventory (the "Sale Process") in the ordinary course of business is substantially as described below.

11. Any interested party may register on the Website to be eligible to participate in auctions for inventory. The Website currently has over 5,000 registered users. Inventory is divided into parcels (the "Parcels") approximately equal to a truckload of inventory. The Debtors then hold online auctions for inventory on the Website.

12. For each Parcel, the Debtors list on the Website information as to the general condition of the inventory -- whether new, of varied condition, or non-functional to be sold primarily for parts -- as well as the brand, model, quantity, description and retail price of products included in the Parcel. Any registered user of the Website may bid on any Parcel. Auctions typically remain open for 7 days. However, the Website incorporates a "popcorn bidding" function whereby, if a

bid is made within a certain time before the set close of an auction, the auction is automatically extended for a period of time to allow continued bidding. This ensures that any last minute bidding affords other interested parties an opportunity to increase their bids by continuing the auction for an additional time period.

13. Following the close of an auction for a Parcel, the winner is notified and is given an additional 7 days to pay for and pick up the Parcel. Payment must be made by wire transfer for amounts over \$1000 to the Debtors in advance of pickup.

14. The Debtors have designed the Sale Process to maximize their return on inventory. In particular, the Sale Process (i) enables the Debtors to easily access more than 5,000 potential purchasers while allowing any additional interested parties to register on the Website and participate in the auctions, (ii) provides transparency, as each registered user of the Website must provide identifying information and (iii) ensures that the auction continues until there are no more interested bidders, thereby maximizing the purchase price. Thus, the Debtors believe that conducting the Sale of

the Excluded Defective Inventory on the Website, in accordance with the Sale Process employed by the Debtors in conducting such sales prior to the Petition Date, will enable the Debtors to maximize value of the Inventory and minimize expenses incurred.

15. Accordingly, the Debtors seek authority to sell the Excluded Defective Inventory pursuant to the Sale Process. Given that the Debtors sold inventory similar to the Excluded Defective Inventory prior to the Petition Date pursuant to the Sale Process, the Debtors believe that the Sale of the Excluded Defective Inventory in accordance with the Sale Process is a transaction in the ordinary course of business. As such, Court authority would not be necessary under Bankruptcy Code section 363(c)(1).

16. Nonetheless, out of an abundance of caution, the Debtors seek authorization from the Court to proceed with the Sale Process and the Sale. However, the Debtors reserve their right to modify the Sale Process as necessary or as they deem appropriate to maximize value for their estates and creditors. As set forth above, the Debtors believe that the Sale Process is ap-

propriate and will maximize the recovery for the Debtors and their estates in connection with the Sale.

17. The Debtors propose that any party wishing to file an objection to the Sale Process or the Sale of the Inventory to the bidder with the highest or best bid (the "Successful Bidder" and the bid by such bidder, the "Successful Bid") free and clear of interests, be required to file such objection by February 11, 2009 at 4:00 p.m. (ET), and that such parties be required to state, with specificity, the legal and factual basis of any objection, unless otherwise ordered by this Court.

**B. Sale Notice.**

18. Because time is of the essence, and because the Sale Process and Sale are reflective of procedures and sales previously conducted by the Debtors in the ordinary course of business, the Debtors wish to avoid the time and expense associated with a second "sale hearing." Thus, following the conclusion of the Sale Process and the Debtors' selection of the Successful Bidder(s) in accordance with Sale Process, the Debtors propose to file with the Court a notice (the "Sale Notice") (i) identifying the Successful Bidder(s), the

Inventory purchased by each Successful Bidder, and the purchase price for such Inventory, and (ii) a statement that the Sale was conducted in accordance with the Sale Process, that the Successful Bidder(s) participated in the Sale Process in good faith and without collusion, the Successful Bidder(s) were not insiders of the Debtors, and that the Successful Bid(s) represent the highest or otherwise best offer for the purchase of all or portions of Inventory.

19. The Debtors propose that the Court approve the Sale to any bidder who emerges as a Successful Bidder pursuant to the Sale Process, conditioned upon the Debtors' filing the Sale Notice. Upon the filing of the Certification, the Debtors propose that the Sale be deemed to have been Court approved such that the Debtors may close the transaction absent any additional hearing or further order of the Court.

#### **APPLICABLE AUTHORITY**

##### **I. THE SALE PROCESS IS REASONABLE AND APPROPRIATE.**

20. Bankruptcy Code section 363(b)(1) provides that "[t]he trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary

course of business, property of the estate." 11 U.S.C. § 363(b)(1). Moreover, Bankruptcy Code section 105(a) provides that "[t]he Court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title." 11 U.S.C. § 105(a).

21. The Debtors believe that the Sale Process is appropriate under Bankruptcy Code sections 105 and 363 to ensure that the Sale is fair and reasonable and represents the maximum value for their estates and creditors. Indeed, as discussed above, the Debtors utilized the Sale Process prior to the Petition Date and, based on their prior sales, believe that the Sale Process is one method for maximizing value of defective inventory, such as the Excluded Defective Inventory. Moreover, the Debtors believe that a sale Excluded Defective Inventory according to the Sale Process will avoid any deterioration of the value of the Excluded Defective Inventory. Accordingly, the Debtors believe the Court should approve the Sale Process.

**II. APPROVAL OF THE SALE OF THE EXCLUDED DEFECTIVE INVENTORY IS WARRANTED UNDER BANKRUPTCY CODE SECTIONS 105(a) AND 363(b)(1).**

22. As set forth above, the Debtors believe that the Sale according to the Sale Process is an ordinary course transaction permitted under Bankruptcy Code section 363(c)(1). 11 U.S.C. § 363(c)(1) (If the business of the debtor is authorized to be operated under section . . . 1108 . . . the [debtor] may enter into transactions, including the sale or lease of property of the estate, in the ordinary course of business, without notice or a hearing . . ."). However, even if the Sale is considered outside of the ordinary course, assets of the Debtors may be sold outside of the ordinary course of business, pursuant to Bankruptcy Code section 363(b)(1), if a sound business purpose exists for doing so. In re WBQ P'ship, 189 B.R. 97, 102 (Bankr. E.D. Va. 1995)(citing Stephens Indus., Inc. v. McClung, 789 F.2d 386, 390 (6th Cir. 1986)); see also In re W.A. Mallory Co., Inc., 214 B.R. 834, 836 (Bankr. E.D. Va. 1997).

23. To satisfy the "sound business purpose test," the debtor must demonstrate that (1) a sound business reason or emergency justifies a pre-

confirmation sale; (2) the sale was proposed in good faith; (3) the purchase price is fair and reasonable; and (4) adequate and reasonable notice of the sale has been provided. In re WBQ P'ship, 189 B.R. at 102.

24. Based upon the results of their analysis, the Debtors' management and advisors have concluded that the Sale of the Excluded Defective Inventory in accordance with the Sale Process will maximize recoveries to the estates and stop further deterioration, if any, of the value of the Excluded Defective Inventory. Furthermore, by selling the Excluded Defective Inventory, the Debtors will be in a position to vacate and either assume, assign and sell or reject the leases for their stores and distribution centers at the conclusion of the going-out-of-business sales, thus limiting the occupancy costs associated with those facilities. Maximizing asset value, preventing asset deterioration, and reducing costs to the estates are sound business purposes that warrant authorizing the proposed Sale.

25. As described in the Sale Process, the Debtors intend to notify those parties that have parties in the Sale Process in the past. In prior similar sales,

more than one bidder has participated in the Sale Process. Thus, the Debtors have reason to believe that the Sale of the Excluded Defective Inventory will be subject to competing bids, thereby enhancing the Debtors' ability to receive the highest or otherwise best value for the Excluded Defective Inventory. Consequently, the fairness and reasonableness of the consideration to be received by the Debtors will ultimately be demonstrated by a "market check" through the Sale Process, which is the best means for establishing whether a fair and reasonable price is being paid.

26. Finally, in light of the circumstances, the Debtors propose to provide notice of the Sale that is reasonably calculated to provide timely and adequate notice to the Debtors' major creditor constituencies, those parties most interested in these cases, those parties potentially interested in bidding on the Excluded Defective and others whose interests are potentially implicated by the proposed Sale.

**III. ANY PURCHASER SHOULD BE GRANTED THE PROTECTION OF  
BANKRUPTCY CODE SECTION 363(m).**

27. The disposition of the Excluded Defective Inventory pursuant to the Sale Process represents a method utilized by the Debtors prior to the Petition Date. The Debtors have extensive experience conducting such sales and believe that the Sale Process maximizes value.

28. Pursuant to the Sale Process, any sale will be the result of an arm's-length transaction between the Debtors and the Successful Bidder. Indeed, the Debtors believe that the Sale Process is designed to ensure that all bidders have an equal and fair opportunity to bid on all or any portion of the Inventory. Furthermore, following the Sale Process, the Debtors will submit the Sale Notice, stating that the sale of the Excluded Defective Inventory resulted from good faith, and arm's-length bidding. Thus, the Debtors respectfully request that this Court find that any purchaser acted in good faith within the meaning of Bankruptcy Code section 363(m).

29. Specifically, Bankruptcy Code section 363(m) provides that:

[t]he reversal or modification on appeal of an authorization under subsection (b) or (c) of this section of a sale or lease of property does not affect the validity of a sale or lease under such authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

11 U.S.C. § 363(m).

30. While the Bankruptcy Code does not define "good faith," the Fourth Circuit Court of Appeals has "adopt[ed] the traditional equitable definition that has been adopted by various courts of appeal: 'one who purchases the assets for value, in good faith, and without notice of adverse claims.'" Willemain v. Kivitz, 764 F.2d 1019, 1023 (4th Cir. 1985)(citations omitted).

31. As has been the Debtors' experience in the past, the Sale Process ensures that a prospective purchaser will not be able to exert any undue influence over the Debtors. Under the circumstances, and conditional upon the Sale Notice to be filed by the Debtors to this Court, this Court should find that (i) the Sale

of the Excluded Defective Inventory is the result of good faith arm's-length transaction(s) and (ii) any ultimate purchaser is entitled to all of the protections of Bankruptcy Code section 363(m).

**IV. THE SALE OF THE EXCLUDED DEFECTIVE INVENTORY FREE AND CLEAR OF CLAIMS, LIENS, AND ENCUMBRANCES SHOULD BE AUTHORIZED UNDER BANKRUPTCY CODE SECTION 363(f).**

32. To facilitate a Sale of the Excluded Defective Inventory, the Debtors request authorization to sell the Excluded Defective Inventory free and clear of any and all interests, including claims, liens, and encumbrances that may be asserted against such property.

33. Under section 363(f) of the Bankruptcy Code, a debtor in possession may sell property free and clear of any interest in such property if, among other things:

- (1) applicable nonbankruptcy law permits sale of such property free and clear of such interest;
- (2) such entity consents;
- (3) such interest is a lien and the price at which such property is sold is greater than the aggregate value of all liens on such property;
- (4) such interest is in bona fide dispute; or

(5) such entity could be compelled, in a legal or equitable proceeding, to accept a money satisfaction of such interest.

11 U.S.C. § 363(f).

34. Section 363(f) permits the sale of estate property free and clear of interests if any one of the five conditions above is met. See, e.g., In re Laines, 352 B.R. 410, 414-15 (Bankr. E.D. Va. 2005).

35. Courts have held that the authority of a debtor to sell assets free and clear of interests is broad and should be read expansively. See In re TWA, Inc., 322 F.3d 283, 289 (3d Cir. 2003); see also United Mine Workers of Am. 1992 Benefit Plan v. Leckie Smokeless Coal Co. (In re Leckie Smokeless Coal Co.), 99 F.3d 573, 582 (4th Cir. W. Va. 1996) (holding that the phrase "any interest in property" includes more than just in rem interests); In re P.K.R. Convalescent Centers, Inc., 189 B.R. 90, 94 (Bankr. E.D. Va. 1995) ("As the plain meaning of the statute demonstrates, § 363 covers more situations than just sales involving liens."). Moreover, courts have noted that the purpose of the "free and clear" language is to allow the debtor to obtain a maximum recovery on its assets in the marketplace. See In

re TWA, Inc., 2001 Bankr. LEXIS 723, at \*8-\*10 (Bankr. D. Del. Mar. 27, 2001).

36. Accordingly, this Court should authorize the Debtors to sell the Excluded Defective Inventory free and clear of any and all interests, including claims, liens, and encumbrances, that may be asserted by any party, with any such claims, liens, and encumbrances attaching to the net proceeds of the Sale of the Excluded Defective Inventory in the same order and priority as they exist against the Excluded Defective Inventory and in accordance with the terms and provisions of the Debtors' post-petition financing facility.

**V. WAIVER OF THE TEN-DAY STAY PROVIDED BY BANKRUPTCY RULE 6004 SHOULD BE WAIVED FOR ANY ORDER APPROVING THE SALE OF THE INVENTORY.**

37. Bankruptcy Rule 6004(h) provides that:  
"[a]n order authorizing the use, sale, or lease of property is stayed until the expiration of 10 days after entry of the order, unless the court orders otherwise."  
Fed. R. Bankr. P. 6004(h).

38. The Debtors request that the Court waive the ten-day stay of Bankruptcy Rule 6004 with respect to the Sale of the Excluded Defective Inventory following

entry of the Order. By waiving such requirements, the Debtors and any purchaser will be able to immediately close the transaction(s) emerging from the Sale Process and approved by this Court, which will in turn save the Debtors continued accrual of administrative expenses and thereby benefit the Debtors' estates.

#### **NOTICE**

39. Notice of this Motion has been provided to those parties who have requested notice pursuant to Bankruptcy Rule 2002 and the Core Group (as defined in the Order Pursuant to Bankruptcy Code Sections 102 and 105, Bankruptcy Rules 2002 and 9007, and Local Bankruptcy Rules 2002-1 and 9013-1 Establishing Certain Notice, Case Management, and Administrative Procedures (Docket No. 130; the "Case Management Order")), as well as (a) all entities known to have an interest in any of the Excluded Defective Inventory to be sold or in similar assets; all federal, state, and local regulatory or taxing authorities or recording offices that have a known interest in the relief requested through the Motion. The Debtors submit that, under the circumstances,

cause exists to limit the notice as described herein and no other or further notice need be given.

**WAIVER OF MEMORANDUM OF LAW**

40. Pursuant to Local Bankruptcy Rule 9013-1(G), and because there are no novel issues of law presented in the Motion and all applicable authority is set forth in the Motion, the Debtors request that the requirement that all motions be accompanied by a separate memorandum of law be waived.

**NO PRIOR REQUEST**

41. No previous request for the relief sought herein has been made to this Court or any other court.

**CONCLUSION**

WHEREFORE, the Debtors respectfully request that the Court enter an Order, substantially in the form annexed hereto, granting the relief requested herein and such other and further relief as may be just and proper.

Dated: February 3, 2009

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